

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,  
Plaintiff,

vs.

CORRECTIONS OFFICER LESTER  
Defendant.

FILED  
HARRISBURG, PA

JAN 7 2002

MARY E. D'ANDREA, CLERK  
Per

Civil No. 1:01-cv-00041  
(Judge Rambo)  
(Magistrate Judge Smyke)

PLAINTIFF'S WRITTEN OBJECTIONS TO THE U.S. MAGISTRATE  
JUDGE'S REPORT AND RECOMMENDATION OF DECEMBER 10, 2001

Come now, the Plaintiff & his Counsel in the above-entitled Civil Action, John Richard Jae, as a layman unlettered in the arts & sciences & legal procedures within the United States, & now files his Plaintiff's Objections to the U.S. Magistrate Judge's Report and Recommendation of December 10, 2001, pursuant to Fed. R. Civ. P. 72(b) & M.D.-LR 72-3 & why, aver deposes & states:

1. The Plaintiff, John Richard Jae, a State Prisoner proceeding pro se commenced this 42 U.S.C. § 1983 Civil Rights Action by filing a complaint on January 10, 2001, alleging that the defendant, a Corrections Officer at the State Correctional Institution at Camp Hill, PA, used excessive force on him August 23, 2000. Plaintiff's Request for Leave to Proceed In Forma Pauperis was granted on January 25, 2001.

2. On March 27, 2001, the Defendant, Corrections Officer Lester, by Attorney, filed his Motion to Revoke Plaintiff's In Forma Pauperis Status to stay the proceedings, herein this case. Defendant Lester, by Counsel, filed his Brief in support of that motion on April 10, 2001.

3. On June 27, 2001, the Plaintiff filed a Petition for writ of mandamus and in support in this case.

4. Defendant Lester's Brief in Opposition to Plaintiff's Petition for writ of mandamus was filed August 14, 2001.

5. On November 7, 2001, U.S. Magistrate Judge J. Andrew Smyer of this Court entered his order, denying plaintiff's petition for writ of Mandamus, granting Defendant Lester's motion to Revoke the Plaintiff In Forma Pauperis Status and vacating the Order of January 23, 2001, granting the plaintiff's request to proceed in forma pauperis and further ordering that on or before November 27, 2001, the plaintiff shall pay the entire \$150 filing fee and that if the plaintiff fails to pay the filing fee, it will be recommended that this action be dismissed.

6. On December 10, 2001, U.S. Magistrate Judge Smyer filed his Report And Recommendation that Plaintiff has not paid the filing fee as ordered and recommending that the case be dismissed and that the case file be closed.

7. Here is Plaintiff's written objections to the U.S. Magistrate Judge's Report And Recommendation of December 10, 2001, herein.

### I. PLAINTIFF'S CONSTITUTIONAL CHALLENGE TO THE PRISON LITIGATION REFORM ACT AND 28 U.S.C. § 1915(g)

In his November 7, 2001, Order, herein this case, U.S. Magistrate Judge Smyer, based upon 28 U.S.C. § 1915(g), states & holds that:

Because the plaintiff has had at least three cases on appeal dismissed as frivolous, malitious or a failure to state a claim, see Doc. 2 at 3, he may not proceed in forma pauperis in this action unless he is under imminent danger of serious physical injury. 21

Plaintiff specifically objects to this above holding of the U.S. Magistrate Judge, because such is based upon 28 U.S.C. § 1915(g) and 28 U.S.C. § 1915(g) unconstitutionally denies a prisoner - Plaintiff his 1st, 5th & 14th Amendments, U.S. Constitutional Rights to access to the courts and to equal protection and due process of the law, as follows:

1/ Due to the fact that this Plaintiff, on December 11, 2001, was transferred to the Penitentiary Unit at the Federal Prison - Greene, he did not actually receive the U.S. Magistrate Judge's Report until 12/11/01.

a. Prisoners Have A Fundamental Right Of Access To The Courts To ~~challenge~~ challenge the conditions of their confinement.

Plaintiff avers & submits that, 28 U.S.C. § 1915(b) (commonly referred to as the 'three-strikes provision') unconstitutionally burdens the affected prisoners' fundamental right to have meaningful access to federal courts to challenge the conditions of their confinement. More the provision is much broader than necessary to achieve the intended reduction in frivolous prisoner litigation, and brings within its broad sweep meritorious claims as well as frivolous claims. Thus, it could result in repeated violation of the affected prisoners' civil right while they serve their sentence.

#### Evolution of Prisoners' Right of Access to the Courts

In *Smith v. Bennett*, 368 U.S. 708 (1961), the U.S. Supreme Court held that a state could not refuse to accept an indigent prisoner's petition for writ of habeas corpus in the state court because the prisoner could not pay the four dollar filing fee. *Smith*, 368 U.S. at 712. While the *Smith* Court agreed that a state need not provide habeas review, once a state provides such review, it cannot deny indigent prisoners access to such review merely because they are unable to afford the filing fee. (*Smith*, 368 U.S. at 712.)

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court expressly rejected the State's assertion that the right of access to the courts did not extend to civil rights actions. (*Id.* at 579) The Court noted that there was no clear demarcation between civil rights claims and habeas petitions because

both actions serve to protect basic constitutional rights. The right of access to the courts . . . is founded in the Due process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or

functionally illiterate," were unable to articulate their complaints to the courts. 41

In the late 1970s, the court made clear in Banks v. Smith, 150 U.S. 817 (1977), that the obligation on the states extended beyond a prohibition against establishing impediments to prisoners' access to courts, but required that they shoulder affirmative obligations to assure all prisoners meaningful access to the courts. (Id. at 824-25) As a consequence, the court observed that the states had to provide inmates with writing instruments, notary services, postage, transcripts, and were required to forego collection of docket fees. (Id.) These affirmative obligations were not limited to criminal appeals and habeas petitions, but extended to civil rights claims as well. The court noted that it has "emphasized" habeas corpus and civil rights actions are of "fundamental importance... in our constitution scheme" because they protect a "most valued rights." 119

Since the early 1990s, the fundamental nature of the prisoners' right of access to the courts has been rendered beyond debate. The Supreme Court has conclusively stated that the federal courts must take cognizance of the valid constitutional claims of prison inmates, 116 and that, as a result of the fact that "a prisoner ordinarily is deprived of the privilege to vote, that right to court action might be said to be his remaining 'most fundamental political' because preservative of all rights." 117

41 Id. As the Third Circuit recently observed in Brennan v. Rengas, 953 F.2d 1145 (3d Cir. 1994), aside from the Due Process Clause, another basis for constitutional right of access to courts is the First Amendment right to petition the government for redress of grievances. Id. at 1452-53 (citing California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Bill Johnson's Restaurants, Inc. v. NLRB, 431 U.S. 731, 741 (1983) (declaring that "right of access to the courts is an aspect of the First Amendment right to petition"). See also Berdella v. Delo, 972 F.2d 244, 249 n.9 (6th Cir. 1992) (finding the right of access may also stem from equal protection rights under Fifth Amendment and First Amendment right to petition).

51 Id. at 827 (quoting Wolff, 418 U.S. at 579; Johnson v. Avery, 393 U.S. 483, 485 (1969)); Martinez, 416 U.S. 396, 419 (1974) ("The constitutional guarantee of due process of law requires the requirement that prisoners be afforded access to the courts in order to challenge their confinement and to seek redress for violations of their constitutional rights.").

61 McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (quoting Turner v. Safley, 482 U.S. 78, 84

71 Id. (quoting Wick v. Hopkins, 118 U.S. 356, 370 (1886); see also Adams v. Carey, 482 U.S. 632 (1987) (1973) (noting that "an inmate's right to... call and answer the court's

In Lewis v. Casey, 116 S. Ct. 2179 (1998), the Supreme Court reaffirmed unequivocally that the right of access includes not only the ability to pursue criminal appeals and post-conviction relief, but also extends to civil rights actions to vindicate basic constitutional rights. 8/

II. Is There A Fundamental Right To In Forma Pauperis Status?

Permitting indigents free access to the courts dates back to Magna Carta. 9/

Following this tradition, Congress enacted the first Federal In Forma Pauperis Statute in 1892. 10/ The purpose of this statute was to guarantee that no citizen would be denied opportunity to commence, prosecute or defend a civil or criminal action in the courts of the United States merely because their poverty makes them unable to pay the filing fees or secure the costs. 11/ The Supreme Court has not yet directly addressed the issue of whether great costs that must be provided to indigent prisoners so they are able to challenge the conditions of their confinement or to vindicate their constitutional rights includes waiver of filing fees in federal civil rights actions. However, there is no doubt that the federal government must pay the cost of filing fees for habeas petitions by indigent prisoners. 12/ Given the equal importance of civil rights cases and habeas petitions in the constitutional scheme, it therefore seems logical to assume that meaningful access to the courts to pursue civil rights claims also would require that government waive filing fees for indigent prisoners. Analysis of the case law bears out this assumption.

An examination of the cases in which the Supreme Court has considered whether the filing fees should be waived for indigent litigants supports a conclusion that such fees generally must be waived in federal courts at least for civil rights cases filed by prisoners challenging the conditions of confinement. The affluence of these decisions strongly suggests that poverty status is a necessary condition for government must provide when the indigent prisoner seeks access to the courts in order to vindicate a fundamental right. Starting with the criminal appeal, habeas corpus cases, the court has consistently held that the constitution requires states to waive filing fees for indigent prisoners in order to

7. Cantelmo, Right as any he may hold . . . . All other things are all 11/6 S. Ct. 2179 (1998).

8. Id. at 2181 (citing Worth, 418 U.S. at 579.)

9. Id. at 2181 (citing Worth, 418 U.S. at 579.)

10. Id. at 2181 (citing Worth, 418 U.S. at 579.)

11. Id. at 2181 (citing Worth, 418 U.S. at 579.)

12. Id. at 2181 (citing Worth, 418 U.S. at 579.)

13. Id. at 2181 (citing Worth, 418 U.S. at 579.)

14. Id. at 2181 (citing Worth, 418 U.S. at 579.)

15. Id. at 2181 (citing Worth, 418 U.S. at 579.)

ensure equal access to review of ~~the~~ criminal appeals and habeas petitions. Whichever of fees is a tool necessary for those litigants to vindicate their most basic fundamental rights.

In Boddie v. Connecticut, 401 U.S. 371 (1971), the U.S. Supreme Court held that due process prohibited a state from denying access to the courts to a divorcing couple who was unable to pay the filing fee because the state has a monopoly on the only legal means to adjust a fundamental private relationship of marriage. *Id.* at 380-83.

All citizens must have access to the process that the state establishes for dissolving a marriage.<sup>13/</sup> Given the interest at stake for the indigent, the court found no merit to Connecticut's argument justifying the filing fee as a measure to reduce frivolous litigation or as a mechanism of resource allocation and recoupment of costs.<sup>14/</sup>

Because a fundamental right was at stake, the state could not close the courthouse to indigents seeking to vindicate that right.

In Little v. Streeter, 432 U.S. (1977), the Supreme Court held that due process required that states provide free blood tests when needed by an indigent in certain paternity proceedings. Without access to the blood test, the court observed the alleged father "deprived a meaningful opportunity to be heard."<sup>15/</sup> Because the determination of familial relationships implicated a fundamental right, the state's financial interest in having the proceedings resolved at a lowest expense to the public was "hardly significant enough to overcome" that fundamental private interest.

The Court also noted that the paternity action more closely resembled the proceedings in Kras than those in Kras or Ortwein<sup>16/</sup> due to the constitutionally significant interests and the lack of an alternative forum.<sup>18/</sup>

Prisoners facing significant deprivations of their fundamental constitutional rights, such as right to be free from racial discrimination,<sup>19/</sup> to marry,<sup>20/</sup> to challenge

<sup>13/</sup> The Boddie Court reasoned that "a cost requirement, laid on its face, may offend due process because it tends to foreclose a party's opportunity to be heard." *Id.* at 380.

<sup>14/</sup> The Boddie Court also reasoned that "other alternatives exist to fees and cost requirements as a means of conserving the time of courts and protecting parties from frivolous litigation, such as perjury penalties, sanctions for false pleadings or affidavits and actions for malicious prosecution or abuse of process, to mention only a few." *Id.* at 381-82.

<sup>15/</sup> *Id.* at 16 (quoting Boddie v. Connecticut, 401 U.S. 371, 377 n.12 (1971)).

<sup>16/</sup> Any reference here to Kras, is to: United States v. Kras, 409 U.S. 434 (1973).

<sup>17/</sup> Any reference to Ortwein, is to: Ortwein v. Schwab, 410 U.S. 656 (1973).

<sup>18/</sup> *Id.* at 160 n.12. The indigent father in Little was a state prisoner at the time of the proceedings. *Id.* at 3.

<sup>19/</sup> See Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam).

<sup>20/</sup> See Turner v. Safley, 482 U.S. 78, 97-99 (1987).

their convictions, <sup>21/</sup> to practice their religion, <sup>22/</sup> to communicate with free persons, <sup>23/</sup> to be free from cruel and unusual punishment, <sup>24/</sup> are more like the indigent parties in Boddie, Streeter and M.L.B. than those in Kas or Artway. Although prisoners are no doubt less sympathetic, and while their rights may appear more sacred than prisoners' constitutional rights, unlike in Kas and the rights at issue in actions challenging the conditions of a prisoner's confinement are clearly fundamental. <sup>26/</sup>

Moreover, given that prisoners' other rights are diminished significantly, that the government is intimately involved in virtually every aspect of the prisoner's life, and that because of incarceration prisoners virtually have no ability to avoid the alleged constitutional deprivation, the right of access for prisoners may be even more fundamental than it is for free citizens. As the Supreme Court held in Lewis, prisoners must be given the "tools" necessary to challenge the conditions of their confinement; the filing fee, or its waiver, is the tool necessary for indigent prisoners to pursue such a challenge. To provide prisoners with a law library, pens, pads, postage, and even access to qualified legal assistance and then deny them the ability to actually file a complaint renders the other tools otherwise

While many federal courts have observed that pauper status is not a tool that must be granted for which there is no guarantee, this view is generally belied by Boddie, Streeter which, when read in the context of Lewis and the other prisoner access to court cases that pauper's status is a tool that must be granted to indigent prisoners when a fundamental right is at issue. <sup>27/</sup>

This conclusion is also supported by the decisions dealing with abusive indigent who have filed numerous vexatious, harassing and frivolous complaints.

In many cases federal courts attempting to control overly litigious and abusive litigants. Injunctions restricting further in forma pauperis filings by the abusive litigants. Section 1915(g) analogize it to this practice of entering injunctions against abusive

suggesting that section 1915(g) did little more than codify an already existing judicial practice. Unlike the broad sweep of Section 1915(g), courts traditionally proceeded very carefully in injunctive relief mindful of the nature of the right that they were restricting.

<sup>21/</sup> Smith v. Bennett, 365 U.S. 708, 712 (1960).

<sup>22/</sup> D. Lane v. Estate of Shabazz, 482 U.S. 315, 348 (1987).

<sup>23/</sup> Pharm. Bur. v. Abbott, 490 U.S. 401, 401-412 (1989).

<sup>24/</sup> Whitley v. Albers, 475 U.S. 313, 319 (1986).

<sup>25/</sup> Any reference here to M.L.B. is to M.L.B. v. S.L.B., 117 S.Ct. 555 (1996).

<sup>26/</sup> See In re Green, 669 F.2d 279, 785 F.2d 18 (D.C. Cir. 1981) (noting that where fundamental right at stake, access could not be barred by financial barriers and, conversely, where fundamental right at stake, the court has upheld financial barriers) (citing Christy, 409 U.S. 434 (1973)).

<sup>27/</sup> Int'l. Fed. of Nurses v. NLRB, 492 F.2d 1069, 1079-80 (11th Cir. 1986) (arguing that "the right to file a lawsuit is a fundamental right") (citing Christy, 409 U.S. 434 (1973)).

Restricting with such injunctions, by first ensuring that the litigant was truly indigent a pauper and then entering narrow injunctions directed at the specific abuse. With the PLRB, however, Congress has taken a much broader approach that leaves no room for such individual discretion. The decisions of these courts that have granted injunctions generally demonstrate that, notwithstanding the belief that pauper status is a privilege, the courts recognize that infringement on the ability to in forma pauperis places a substantial burden on the ability to exercise the fundamental right of access to the courts. See also Fickett v. City of Richmond, 16, 1993 US LEXIS 22437, at 3 (4th Cir. Sept. 2, 1993) (finding that requirement that defendant pay 5% of filing fee is a ban against ever proceeding in forma pauperis in "potential meritorious lawsuit," which effectively denies defendant's access to courts); V. Alabama Pub. Serv. Comm'n, 936 F.2d 512, 517 (11th Cir. 1991) ("In recent years courts have attempted to balance the various concerns and have determined that if the right of access means anything, it means that courts cannot construct blanket orders that completely close the courthouse doors to those who are extremely indigent." In re Tyler, 839 F.2d 1290, 1294 (8th Cir. 1988) (concluding that "if he were to be permitted from proceeding in forma pauperis in any case, his access to this court would be totally denied. . . . We reject this alternative as to strict a sanction to impose. . . .").

b. Section 1915(g) Violates Due Process And Denies Equalization of the Law Under the Fifth and Fourteenth Amendments of the United States Constitution And Plaintiffs Rights Thereunder.

Section 1915(g) precludes access to the federal courts for the targeted class of indigent prisoner litigants except in very limited circumstances. The aside from the most extraordinary circumstances, section 1915(g) radically reduces the role of federal courts in protecting the constitutional rights of prisoners. Prohibiting in forma pauperis status for those prisoners who have had three prior dismissals for frivolousness or for failure to state a claim. This is unconstitutional.

Congress now has effectively closed the doors to the federal courts in all manner of constitutional claims for indigent prisoners with three strikes against them. Section 1915(g) is not a facially neutral statute that has a disparate impact on indigents, but rather it specifically targets indigent prisoners as opposed to all indigents, for different treatment and unequal protection of the law. (If the courts cannot construct blanket orders that completely close the courthouse doors to those who are extremely indigent, then they must at least require that they be given the opportunity to secure relief, he simply may not be required to pay a filing fee.)).

by the federal courts. <sup>28/</sup> Because a prisoner's right of access to the courts is a fundamental right, and notwithstanding the fact that neither prisoners nor indigents are a protected class, wholesale foreclosure of a class of citizens from access to federal courts is subject to scrutiny under both the Equal Protection component and the Due Process Clause of the Fifth Amendment. Generally, if a statute burdens a fundamental constitutional right, then strict scrutiny is applied. This requires that the statute be narrowly tailored to serve a compelling interest.

Because Section 1915(g) burdens indigent prisoners' fundamental federal constitutional rights to have "adequate," "effective" and "meaningful" access to the courts, such requires application of strict scrutiny as to such.

In Renov v Flores, 507 U.S. 292, 301-02 (1991), the Supreme Court held that "Fifth and Fourteenth Amendments' guarantee of 'due process of law' . . . include a substantive component, which forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest".

As the Supreme Court noted in M.L.B. v. S.L., <sup>12/</sup> that the access to court decisions decisions reflected both equal protection concerns but "fencing out" putative indigents and due process concerns related to the fair "state-ordered proceedings anterior to adverse state action." 117 S. 566 (1996). . . . In either case, to the extent that §1915(g) burdens a fundamental right, the analysis essentially will be the same under either component of the Fifth Amendment. As the court noted in Maffei, 417 U.S. 600 (1974), ~~the~~ "Due process" emphasizes the relationship between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated." 417 (1974). "Equal protection," on the other hand, emphasizes

<sup>28/</sup> Math v. McInerney, 448 U.S. 297, 320 n. 26 (1980) (the equal protection component of the Fifth Amendment is a "class-based" discrimination and when a facially neutral law

treatment by a state between classes of individuals whose situations are arguably indistinguishable. <sup>11</sup>Id. Discussing the claim that due process required that indigent prisoners be appointed counsel and discretionary appeals, the Ross court noted that "[u]nfairness results only if indigents are singled out by the state and denied meaningful access to the appellate system because of their poverty." <sup>12</sup>Id. at

Plaintiff avers & submits that herein this instant case, it is dismissed because of his inability to pay the entire \$150.00 fee upfront all at once he will be <sup>infringed</sup> denied meaningful access to this federal court because of his poverty and that § 1915(g) singles this Plaintiff, an indigent prisoner out and that § 1915(g) is not narrowly tailored to serve a compelling interest.

Given the above foregoing, it should be clear that section 1915(g) is unconstitutional and that Congress abused its authority in enacting such statutory provision provisions that essentially tell affected indigent prisoners to go to the state courts, that they courts are no longer open to them, and that they alone will receive protection of the law. By withholding the most essential tool for challenging the prisoners' conditions of confinement, Congress unconstitutionally burdened the affected class of prisoners' right meaningful access to the federal courts. After decades of liberal reforms broadening prisoners' rights, the pendulum of the reform movement has swung to far in the opposite direction. The three strikes provision should be struck down or modified to conform with the Constitution.

The U.S. Magistrate Judge thus revoked this Plaintiff's in pauperis status in this case based upon an unconstitutional federal statute and such order must, by law, be vacated by the District Judge & Plaintiff's IFP status must be reinstated herein this case, which must not be dismissed.

as contemplated or reaffirmed a particular course of action at least in part because merely in spite of its adverse effects upon an identifiable group. <sup>13</sup> (internal quotation marks omitted) *Holmes v. Sec. of Dep't of Soc. Servs.*, 547 U.S. 319, 330 (2006) (quoting *Id.*, 547 U.S. at 330).

II. THE U.S. MAGISTRATE JUDGE ERRED IN  
 APPLYING ABDUL-AKBAR V. MCKELVIE, 239 F.3d  
 307 (3d Cir. 2001) TO THIS CASE.

In his November 7, 2001, Order, in this case sub judge, the  
 U.S. Magistrate Judge, stated & held:-

The court must assess whether the prisoner was  
 under imminent danger at the time the complaint  
 was filed. Abdul-Akbar v. McKelvie, 239 F.3d  
 307, 312 (3d Cir. 2001). <sup>29</sup>

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The U.S. Magistrate Judge also stated & held, therein, that:  
 The plaintiff's claim that he was in imminent danger  
 of serious physical injury at the time he filed his  
 complaint because he could be assaulted again  
 and because he has a heart condition is not  
 consistent with known facts. By the time he  
 filed his complaint the plaintiff was housed at a different  
 institution from the institution where the defendant  
 allegedly assaulted him. Accordingly, pursuant to  
 28 U.S.C. § 1915(g) the plaintiff may not proceed in forma  
 pauperis in this court in this case. <sup>30</sup>

This Plaintiff specifically objects to the above statements/  
 of the U.S. Magistrate Judge in this case, & heavers & submits  
 such holdings/statements are clearly erroneous & contrary to the  
 based upon the following facts & arguments.

On January 10, 2001, this Plaintiff commenced this civil rights at  
 filing his complaint. On January 25, 2001, this court granted this plaintiff  
 request to proceed in forma pauperis in this case.

At the time this plaintiff filed his complaint and at the time the  
 granted him leave to proceed in forma pauperis herein this case,  
1. Roman, 116 F.3d 83 (3d Cir. 1997) was the controlling authority in this  
 case. In the U.S. Magistrate Judge's Order of November 7, 2001, at 2

and in Gibbs v. Roman, 116 F.3d 83 (3d Cir. 1997), the U.S. Court of Appeals for the Third Circuit stated & held that the Court must assess whether the prisoner was under imminent danger at the time of the incident complained about.

However, in Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2000), the Third Circuit held that the Court must assess whether the prisoner was under imminent danger at the time the complaint was filed, ~~overruling~~ its prior decision in Gibbs v. Roman, as set forth above.

However, because Abdul-Akbar v. McKelvie was not only decided by the Third Circuit after Plaintiff had filed his complaint herein, but also several days after this Court had granted Plaintiff's request for leave to proceed in forma pauperis in this case, and the Third Circuit did not hold that the new standard for determining imminent danger in Abdul-Akbar was to be applied retroactively to cases which had been filed before such decision/change in the imminent danger standard, Gibbs v. Roman was the controlling standard to be applied in this instant case, the U.S. Magistrate Judge was required to determine whether this Plaintiff was under imminent danger of serious physical injury at the time of the incident and under Gibbs v. Roman, not under Abdul-Akbar v. McKelvie.

Because the U.S. Magistrate Judge used the wrong standard herein to determine whether or not this Plaintiff was under imminent danger of serious physical injury, his order of November 7, 2001, should be reversed and the District Judge should not adopt his Report and Recommendation of December 10, 2001, in this case and should remand this case to the U.S. Magistrate Judge to determine whether or not this Plaintiff was under imminent danger of serious physical injury at the time of the incident alleged in the complaint under Gibbs v. Roman.

RESPECTFULLY SUBMITTED  
 J. R. B. BOGAL  
 PRO SE

Jae vs. Lester,  
Civil No. 01-CK-0041  
CERTIFICATE OF SERVICE

I Certify that on the 28th of December, 2001, I served a true & correct copy of the within Plaintiff's written Objections to the U.S. Magistrate Judge's Report And Recommendation of December 10, 2001, the person listed below, by way of U.S. 1st class Mail, Postage prepaid and addressed to:

Mr. Michael McGovern,  
Assistant Counsel  
Office of the Chief Counsel of  
The Pennsylvania Department of Corrections  
55 Utley Drive  
Camp Hill, PA 17011

I also certify that on the 28th of December, 2001, I gave to the officials here for mailing to this court, the original of the above-said document.

I Certify under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the above is true and correct.

(s) John Richard Jae  
MR. JOHN RICHARD JAE  
#BQ-3214  
P.O. Box 99901  
Pittsburgh, PA 15233-01

Dated/Executed On:  
28th December 2001 =  
At: Pittsburgh, Pennsylvania =

Plaintiff and Pro Se Counsel